NO. 2744

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,
Appellant,

v.

GEORGE B. BURKE, and E. W. FERRIS, as Administrator of the Estate of David L. Kelly, deceased, and MOUNTAIN TIMBER COMPANY, a Corporation,
Appellees.

PETITION FOR REHEARING.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

BEACH, SIMON & NELSON,
Attorneys for Appellant,

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Comes now the appellant and petitions the Court for a rehearing of the above entitled matter, and as grounds therefor respectfully presents the following for the consideration of the Court:

1. **The industry of counsel and of the Court has failed to discover a single direct precedent in English or American jurisprudence for the conclusion reached by the Court.**

2. **The conclusion reached by the Court affirms judgment on a bond before the breach of any of its conditions.**

3. The conclusion reached by the Court affirms a judgment against one not a party to the cause on an extraneous instrument not entered into pursuant to any order or rule of court or State or Federal law.

4. The conclusion reached by the Court treats as a personal judgment a decree which under the decisions of the United States Supreme Court and under the Federal equity rules cannot have any greater force than a mere ascertainment of the amount of indebtedness prior to the sale of the mortgaged property.

We append a brief exposition of these points.

I.

DECISION WITHOUT PRECEDENT.

The fact that a decision is without precedent is, of course, not in any sense an indication that it is erroneous. It should, however, serve to give pause—to invoke a more than ordinarily careful examination of its basis, scope and results and in view of the well known danger of argument from analogy, a careful inspection of the supposed authorities for the position taken.

The opinion of the Court states the facts of the case accurately and fairly to the appellant; we earnestly urge the Court to consider before stamping its opinion with finality whether its reasoning and citations of authority have any just relation to these facts.

Here is a suit to foreclose a mortgage; an application for an injunction to restrain the cutting of timber pend-

ing suit; a private arrangement between the parties whereby the application for injunction is not to be pressed in consideration of the furnishing of a bond for the protection of the plaintiff; a decree ascertaining the amount of indebtedness before foreclosure sale and simultaneously therewith awarding judgment against the surety on the bond referred to.

Manifestly, the situation of such a surety is entirely different from a surety on a bond furnished by a plaintiff pursuant to order of court as a condition of injunctive relief. A decision in favor of the defendant in such a suit is a finding that plaintiff was not entitled to the injunctive relief, and a phase of that decision is the ascertainment of the damage to secure payment of which the Court required the execution of the bond. It was freely conceded by us that the authorities recognize the correctness of such a proceeding, but it can hardly be said to constitute a precedent for a case the theory and facts of which are totally different.

The observations contained in the last paragraph apply particularly to the following decisions cited and quoted at length in the opinion of this Court, each of which involved a plaintiff's bond required by the Court as a condition of injunctive relief:

Russell v. Farley, 105 U. S. 433.

Tyler Mining Co. v. Last Chance Mining Co., 90 Fed. 15.

Baker & Bennett Co. v. Cass Co., et al, 224 Fed. 439.

Cimiotti Unhairing Co., et al v. American Fur Refining Co., et al, 158 Fed. 171.

Again we believe that the Court, upon reconsideration, will not deem that a just analogy inheres in the conceded right to enter judgment against the surety on a supersedeas bond. That is what was done in the remaining two cases cited in the opinion as authority for sustaining the action of the lower court:

> Empire State-Idaho Mining & Developing Co., et al v. Hanley, 136 Fed. 99,
>
> Perry, et al v. Tacoma Mill Co., 152 Fed. 115.

The foregoing are all of the cases cited by the Court as authorities for the principle that the lower court had jurisdiction of appellant. We respectfully submit that none of them constitutes a precedent or even furnishes an analogous illustration.

II.

JUDGMENT ON BOND IN ADVANCE OF BREACH.

The bond provided that

> "if Mountain Timber Company (the mortgagor) shall pay, or cause to be paid, in full, any judgment which shall be rendered in favor of the plaintiff in the above entitled action"

the bond should be void, otherwise in full force.

How could the Court without doing violence to the accepted meaning of the simple words used, find that the condition of, or a breach of this obligation had occurred until there was a failure to pay the judgment?

Even if it be conceded for the present that the decree in advance of sale, ascertaining the indebtedness, amounted to a judgment in the sense mentioned in the bond, yet there would be no violation of its terms until a failure to pay the amount thus decreed, occurred.

We assume that judgment could hardly have been rendered against the surety **before** the decree. Is there any stronger logical basis for rendering it **simultaneously** with the decree?

III.

JUDGMENT ON EXTRANEOUS INSTRUMENT AGAINST ONE NOT A PARTY.

This matter has been adverted to under I *supra*. We confess that our idea as to the power of courts over litigants and particularly over persons **who** are **not** litigants has been considerably shaken, but it would seem to be an axiom so deeply rooted that it refuses to be torn from its juridical moorings, that ordinarily courts do not give judgments against persons **not** parties to the cause. A distinct exception has been created by statutes and rules of court as to sureties on attachment, re-delivery and supersedeas bonds, and bonds exacted by order of court as a condition of injunctive relief. We invite the Court's attention, however, to the fact apparently overlooked that this bond was **not** executed pursuant to any order of court. The only recorded connection of the District Court with the bond appears in the Findings of Fact and Decree.

If A sues B and threatens to attach B's property, but desists therefrom because of a bond tendered him by C as surety to pay any judgment which may be rendered, and that bond is accepted without any order of court and purely by private agreement between the parties, can a court, even under statutes of a State permitting judgment against sureties on bonds to discharge attachments, enter judgment against C, or is A relegated to a common law action for breach of the bond? We are unable to perceive any difference in principle between this supposed case and the one at bar.

IV.

DECREE NISI TREATED AS PERSONAL JUDGMENT.

We shall not repeat the argument of our brief (Appellant's brief, pp. 6-10 inclusive), on this subject. We re-affirm our statement on the basis of the decisions of the United States Supreme Court there cited, and the RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, that there can be no judgment for the amount of mortgage indebtedness or any portion thereof, in advance of sale, and that the power of the court is limited to the ascertainment of the indebtedness and an order to sell. A deficiency judgment may by virtue of the authority conferred by the rules, be entered for any balance that may be found due after the sale.

Now, the Court in its opinion cites the case of CHICAGO & VINCENNES R. R. v. FOSDICK, 106 U. S. 47, as authority for the statement that a

decree finding a mortgage valid for the amount of the debt, ordering a sale of the premises, etc., is final and complete and may be appealed from. This may freely be granted without in the remotest degree affecting our contention. The Supreme Court points out that such a decree is in the nature of a Decree *nisi,* ascertaining the amount due and providing for sale, unless the amount be paid within a time fixed. This precisely accords with our contention. If the Supreme Court is right the District Court in the case at bar was wrong. A decree finding the amount due and ordering the sale of the property is unquestionably a final decree, because it disposes of the property, but the fact remains that such a decree is not a money judgment and that the District Court at such a stage of the proceedings is without authority to enter a money judgment against the mortgagor in a foreclosure suit. Indeed the Supreme Court, in the case cited, immediately after denominating the decree appealable, points out how it differs from a money judgment.

The condition of the bond was not that the surety would pay the amount found to be due in the event a foreclosure was decreed, but that if the mortgagor failed to pay the judgment, then the surety would be liable. Manifestly this refers to a money judgment since there is no way of paying any other kind of judgment. It could not "pay" a decree ordering the sale of property.

At page seven of its typewritten opinion, the Court says in this connection:

> "the bond bound the appellant to pay any judgment that might be rendered against Mountain Timber Company in the cause, and when the Court

made a decree against the property, the liability of the appellant was fixed."

This, we respectfully remind the Court, is not a correct statement of the terms of the bond which was to be in force in the event of the **failure** by the Mountain Timber Company to **pay** such judgment.

The liability of the Surety Company pre-supposed

(a) **Judgment** against the Mountain Timber Company, mortgagor.

(b) **Failure** on the part of Mountain Timber Company to pay such judgment.

Neither of these conditions precedent had occurred. On what theory then could the decree ascertaining the amount due, enter judgment for breach of the bond?

The observation is also made by the Court in this connection that "the form of the decree was not objected to in the District Court." Whatever its pertinence as to a party to the cause, it is hardly applicable to a non-participant. The Surety Company had not even any notice—in any just sense—of an intention to enter such a judgment, all of which, however, is beside the mark, for the palpable reason that a judgment which the record shows to be **without basis** cannot derive validity because of the failure of one of the parties mentioned to appear in the District Court and there object to its **form.** It was a nullity and the Surety had the right to treat it as such, and to ask at the hands of the Appellate Court a reversal and cancellation thereof.

The mention of "Notice" leads to the inquiry whether

in a case pending in the United States District Court at Tacoma, a notice given to a Clerk employed in the office of a statutory agent of a party at Tallahassee, Florida, would be regarded as anything more than a sorry jest. Of course, Tallahassee is farther from Tacoma than Portland, Oregon, but just what additional sanctity would follow handing such a paper to a similar individual in the State of Oregon is not apparent.

The Court reserves opinion upon the point as to whether judgment could have been given without notice, and observes that the point of lack of notice is not raised in the Assignment of Error. We respectfully ask the Court again to consider whether such a disposition can justly be made of this point. The Assignment of Error urged lack of jurisdiction over the Surety Company, and if notice is necessary to jurisdiction to enter judgment, then the point was comprehended in the Assignment, unless the Assignment is to partake of the functions of a brief setting forth subdivisions and argumentation. The appeal was based on the single, narrow point that **on the face of the record the lack of jurisdiction was apparent.** Our understanding of jurisdiction is that it covers **parties** and **subject** matter.

* * * * * * * *

The learned judge who wrote the opinion pointed out in the concluding paragraph thereof that by the terms of the Court's decree the Surety Company as a matter of fact would not be called upon to pay anything except a deficiency after sale. This is quite true, unless the District Court sees fit to change its order

withholding execution. If it had the right to enter the judgment against the Surety, it can control process in the way of execution and the same power which withholds execution can award it.

We do not understand that this Court intended to indicate that it would affirm a judgment entered without jurisdiction because in the end, at some future time, a similar result can be reached in a valid proceeding. The Court is aware of the fact that a litigant is often influenced by matters as to which the record is silent, and that consideration, aside from the advantages to accrue from the orderly administration of justice should prevent any importance being attached to the fact, if it be a fact, that eventually the Surety will incur the obligation thus prematurely assessed against it.

We trust the Court will not take offense at our suggestion that even a surety company may subscribe to the doctrine that:

"Sufficient unto the day is the evil thereof."

Respectfully submitted,

BEACH, SIMON & NELSON,

Attorneys for Appellant.

State of Oregon,)
) ss.
County of Multnomah.)

I, Roscoe C. Nelson, one of the attorneys for the appellant herein, do certify that the forgoing petition for rehearing is not being interposed for any purpose of delay; and I further certify that in my judgment the considerations urged are well founded.